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Supreme Court, U.S.
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In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Unable to dispute that circuits are divided over the permissibility of post-judgment consent under 28 U.S.C. §636(c), Withrow attempts to diminish the importance of this question by erecting barriers to review—none of which exist. This case squarely presents the issue, and the Court should grant the petition for writ of certiorari to resolve this important and unsettled question of federal law.

I. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER POST-JUDGMENT CONSENT.

Although Withrow attempts to marginalize the issue of post-judgment consent under §636(c), the substantial circuit split belies his characterization. Four courts of appeals have repeatedly addressed the question and remain deeply divided on the answer. *See* Pet. 9-11 (citing conflicting decisions from the Fifth Circuit (which categorically rejects post-judgment consent), the Ninth Circuit (which generally rejects post-judgment consent), and the Seventh and Eleventh Circuits (which uniformly accept post-judgment consent)).

The persistent conflict over post-judgment consent infuses uncertainty into the federal judicial system, disadvantaging litigants and district courts that continue to struggle with expanding dockets and rely on magistrate judges to expedite case resolution. Judicial—and litigant—resources are squandered when, as in Withrow's case, an appellate court nullifies a jury verdict and judgment by rejecting post-judgment consent. Because of "the importance of magistrates to an efficient federal court system," *Peretz v. United States*, 501 U.S. 923, 929 (1991), the Court should grant the petition and resolve whether post-judgment consent satisfies the requirements of §636(c).

II. No Obstacles Impede Review of the Question Presented.

Attempting to dissuade the Court from granting the petition for writ of certiorari, Withrow conjures up obstacles to review that do not exist. For example, Withrow erroneously contends that the Court "has no basis for reaching the question presented" because Petitioners' post-judgment consent was "at odds" with their failure to expressly consent before judgment—either in writing or orally. Br. Opp'n 10-12. This argument defies logic. Had there been express written or oral consent prior to judgment, the sufficiency of post-judgment consent under §636(c) would not be at issue. Indeed, it is the absence of express pre-judgment consent that squarely places the post-judgment-consent question before the Court.

Moreover, Withrow does not dispute that, prior to judgment, Petitioners never challenged, questioned, or objected to the magistrate judge's repeated assertions of authority to preside over the case for all purposes, including entry of final judgment, *see, e.g.*, Pet. 26a, 27a; *cf. id.* 21a, and that Petitioners proceeded to try the case before the magistrate judge and a jury. If such pre-judgment conduct is "at odds" with consent, Br. Opp'n 12, then no case would present this question.

Withrow also raises alternative grounds for affirmance based on the local rules for the Southern District of Texas and 28 U.S.C. §1291, but neither ground poses an obstacle to review. Although a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), Withrow did not raise these arguments below. The Court has consistently refused to consider alternative grounds for affirmance advanced for the first time in this Court. *See, e.g.,*

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989). Accordingly, Withrow's new alternative grounds present no obstacle to resolving the issue of post-judgment consent, on which the Fifth Circuit's judgment rests. *See, e.g. Demarest*, 498 U.S., at 188-89 (rejecting respondent's argument that alternative grounds for affirmance, raised for the first time in this Court, hindered consideration of the question presented).

Regardless, Withrow's two alternative grounds are not viable and, therefore, would not impede consideration of the post-judgment-consent question in this case. First, Withrow misplaces reliance on the local rules for the Southern District of Texas, which require all parties' consent prior to a magistrate-judge referral.[1] Neither the district court nor the Fifth Circuit mentioned local requirements in rejecting Petitioners' post-judgment consent. *See* Pet. 1a-11a, 14a-19a.[2] Instead, both courts premised their holdings directly on 28 U.S.C. §636(c)—mistakenly concluding that a lack of express consent destroys subject-matter jurisdiction and, therefore, can be neither waived nor cured by post-judgment consent. Pet. 3a, 14a, 18a; *see also id.* 13a. Because local rules do

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1. Under the local rules, it is the responsibility of the *plaintiff*—Withrow in this case—to secure all parties' written consent and to file the requisite forms with the district-court clerk prior to referral of a case to a magistrate judge. *See* Br. Opp'n 3 (quoting General Order No. 80-5 (superseded by General Order 2001-6)). It would be perverse for Withrow to obtain a new trial based on his own failure to obey the local rules.

2. Withrow concedes that the local-rules argument was not raised in the Fifth Circuit but suggests it is "preserved in the record below." Br. Opp'n 15. As the argument also was not made in the district court, it should not be considered for the first time by this Court.

not determine subject-matter jurisdiction,[3] they could not afford an alternative ground for the lower courts' jurisdictional holdings. Accordingly, Withrow's local-rules argument would be immaterial to the Court's review of the Fifth Circuit's judgment.[4]

Nor can Withrow manufacture an obstacle to review by hypothesizing, as a second alternative ground for affirmance, that the Fifth Circuit's judgment could be based on lack of appellate jurisdiction under 28 U.S.C. §1291, not lack of subject-matter jurisdiction in the district court. *See* Br. Opp'n 20-22 (suggesting that a judgment by a magistrate judge lacking pre-judgment consent is an interlocutory report and recommendation that cannot be appealed under §1291). The plain language of the Fifth Circuit's

3. District courts may develop local rules governing docket-management and courtroom practices, *see* FED. R. CIV. P. 83, but such rules cannot divest a court of subject-matter jurisdiction—which is constitutionally conferred and defined by an act of Congress. *See id.*; *see also* U.S. CONST. art. I, §8, cl. 9; *id.* art. III, §1; 28 U.S.C. §1331 (establishing federal-question jurisdiction, which applies to Withrow's suit).

4. Withrow erroneously contends that Petitioners cannot challenge the Fifth Circuit's jurisdictional view of consent because a sentence in the "Standard of Review" section of Petitioners' Fifth Circuit brief stated that "jurisdictional questions" are reviewed *de novo*. Br. Opp'n 19. As Fifth Circuit precedent (and the limited remand order in Withrow's case) already classified §636(c) consent as a jurisdictional question, Pet. 13a, the brief recited that circuit's standard of review for such questions. By contrast, the issues and argument sections of the brief consistently framed the issue in terms of the *magistrate judge*'s jurisdiction (*i.e.*, authority) to conduct the trial and to enter judgment—not the existence of subject-matter jurisdiction over Withrow's suit. *See* Appellees' Br. 1-5, *Withrow v. Roell*, No. 00-40627, in the United States Court of Appeals for the Fifth Circuit.

opinion—and the relief afforded therein—dispels this revisionist theory.

Under Withrow's hypothetical, the Fifth Circuit silently regarded the trial-court judgment as an interlocutory report and recommendation. As Withrow acknowledges, however, the proper disposition for a premature appeal is dismissal for lack of appellate jurisdiction. *See* Br. Opp'n 21-22; *see also, e.g., McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001) (per curiam); *Rembert v. Apfel*, 213 F.3d 1331, 1333, 1335 (CA11 2000). That is not what the Fifth Circuit did. Instead, the Fifth Circuit vacated the trial-court judgment, voided the jury verdict, and remanded for a new trial. Pet. 10a-11a. That relief exceeds what the Fifth Circuit could have granted in a dismissal for lack of appellate jurisdiction pursuant to 28 U.S.C. §1291. *See McNab*, 240 F.3d, at 1327-28; *Rembert*, 213 F.3d, at 1335. The terms of the Fifth Circuit's judgment, therefore, negate Withrow's theory.

Indeed, because Withrow's §1291 theory would require modification of the Fifth Circuit's judgment, it is not an argument he can advance, as Respondent, without filing a cross-petition. *See, e.g., Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (reiterating that, absent a cross-petition, respondent cannot advance an argument that would modify the judgment in any manner—even by affording less relief to respondent).

This case squarely presents the question whether post-judgment consent satisfies the referral requirements of §636(c), and no obstacles impede review. The Court should grant the petition and resolve this important and unsettled question of federal law.

III. THE FIFTH CIRCUIT'S JURISDICTIONAL VIEW OF CONSENT IS INCONSISTENT WITH OTHER CIRCUITS' VIEWS ON §636 AND MERITS CONSIDERATION BY THIS COURT.

The Fifth Circuit's jurisdictional view of consent is inconsistent with Tenth Circuit decisions holding that defects in §636 referrals do not implicate subject-matter jurisdiction. *See In re Griego*, 64 F.3d 580, 583 (CA10 1995); *Clark v. Poulton*, 963 F.2d 1361, 1366-67 (CA10 1992). Although Withrow contends these decisions are inapposite because they involved defects under §636(b)—pursuant to which a district-court judge enters the final judgment, *see* Br. Opp'n 21—the Tenth Circuit's reasoning was not based on that distinction. *See Griego*, 64 F.3d, at 583; *Clark*, 963 F.2d, at 1366-67. Indeed, *Clark* reviewed the statutory structure of §636 as a whole before distinguishing a magistrate judge's statutory authority from subject-matter jurisdiction. 963 F.2d, at 1363-64, 1366-67.

Moreover, the Third, Seventh, and Ninth Circuits have drawn distinctions between statutory authority and subject-matter jurisdiction in cases involving final judgments entered by magistrate judges pursuant to §636(c)—the precise provision at issue in this case. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041 (CA7 1984) (explaining that parties' consent under §636(c) is a personal right subject to waiver, not a question of subject-matter jurisdiction); *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 543 (CA9 1984) (en banc) (noting that consent to a magistrate judge under §636(c) is akin to personal jurisdiction—which, unlike subject-matter jurisdiction, can be waived by agreement or failure to object); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983) (reasoning that issues of consent under §636(c) are subject to waiver because they relate "not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial").

The inconsistency between these decisions and the Fifth Circuit's jurisdictional view of consent presents another reason why this case merits consideration by the Court. If a jurisdictional approach to consent is not required by §636(c), the Fifth Circuit had no basis to vacate the final judgment and void the jury verdict, squandering judicial—and litigant—resources when no party claimed the magistrate judge proceeded without that party's consent. Accordingly, the Court should grant the petition not only to resolve the circuit split over post-judgment consent, but also to clarify whether defects in the §636(c) referral process implicate subject-matter jurisdiction and require *sua sponte* investigation by appellate courts.

IV. THE COURT SHOULD DECLINE TO ADDRESS RESPONDENT'S ADDITIONAL "QUESTION PRESENTED."

The Brief in Opposition lists a second question presented that challenges—for the first time in this Court—the constitutionality of provisions of the Federal Magistrate Act that permit magistrate judges to preside over civil trials and enter final judgments. *See* Br. Opp'n i, 18-19. The Court should grant the petition for certiorari on the question presented by Petitioners but decline to consider Withrow's new question.

Far from challenging the constitutionality of the Federal Magistrate Act, Withrow consented to proceed before a magistrate judge and did not question that judge's authority until he lost a jury trial and appealed the adverse judgment. Even then, Withrow never contended that the Act itself was unconstitutional. Rather, he argued that §636(c) does not permit post-judgment consent, and the Fifth Circuit agreed. If, however, post-judgment consent confirms a magistrate judge's authority to conduct trial and to enter a final judgment—as Petitioners maintain, and as the Seventh and Eleventh Circuits have held—Withrow should be bound by the bargain he struck. This Court should not entertain a belated

challenge to the magistrate-judge provisions Withrow invoked to expedite resolution of his case. *See Geras*, 742 F.2d, at 1041 (stating that parties who consent to proceed before a magistrate judge "should not be allowed to challenge the constitutionality of the provisions under which they voluntarily chose to proceed").

Additionally, the Court should decline to consider Withrow's new question because it introduces an argument advanced for the first time in this Court. *See, e.g., Matsushita*, 516 U.S., at 379 n.5; *Lytle*, 494 U.S., at 551 n.3; *Demarest*, 498 U.S., at 188-89; *Granfinanciera*, 492 U.S., at 38-39. Without any lower-court decision on the constitutionality of the Federal Magistrate Act, it would be inadvisable to address this issue. *See, e.g., Lytle*, 494 U.S., at 551 n.3 (observing that considering a new question "without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion").

Moreover, the question does not warrant consideration because all of the circuits to consider constitutional challenges to the Act—including the Fifth Circuit—have uniformly upheld the consensual referral provisions in §636(c), and this Court has consistently declined to review those decisions. *See D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (CA Fed.), *cert. denied*, 474 U.S. 825 (1985); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1315-16 (CA8 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985); *Collins v. Foreman*, 729 F.2d 108, 109-110 (CA2), *cert. denied*, 469 U.S. 870 (1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (CA1), *cert. denied*, 469 U.S. 852 (1984); *Pacemaker Diagnostic Clinic of Am. v. Instromedix Inc.*, 725 F.2d 537, 547 (CA9) (en banc), *cert. denied*, 469 U.S. 824 (1984); *see also Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (CA11 1987); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (CA6 1985); *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1284-85 (CA4 1985); *Field v. Wash. Metro. Area Trans. Auth.*, 743 F.2d 890, 893-95 (CADC 1984); *Geras v. Lafayette*

Display Fixtures, Inc., 742 F.2d 1037, 1045 (CA7 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (CA5 1984); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983). Thus, there is no conflict to resolve, *see* SUP. CT. R. 10(a), and no extraordinary circumstance to justify Withrow's raising the issue for the first time in this Court.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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